IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* *	C.A. NO. 15-235M
DELINDA M. MARTINS	
VS.	SEPTEMBER 8, 2016
	2:00 P.M.
FEDERAL HOUSING FINANCE AGENCY, et al	
* *	PROVIDENCE, RI

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,

DISTRICT JUDGE

(Cross-Motions for Summary Judgment, Motion to Dismiss)

APPEARANCES:

FOR THE PLAINTIFF:
STEVEN FISCHBACH, ESQ.
JEFFREY C. ANKROM, ESQ.
RI Legal Services, Inc.
Housing & Foreclosure Prevention Unit
56 Pine Street, Suite 400
Providence, RI 02903

FOR THE DEFENDANTS:
MICHAEL A.F. JOHNSON, ESQ.
Arnold & Porter, LLP
555 12th Street NW
Washington, D.C. 20004

SAMUEL C. BODURTHA, ESQ.
Hinshaw & Culbertson LLP
321 South Main Street, Suite 301
Providence, RI 02903

Court Reporter:
Karen M. Wischnowsky, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903

8 SEPTEMBER 2016 -- 2:00 P.M.

THE COURT: Good afternoon, everyone. We're here this afternoon in the case of Delinda M. Martins versus Federal Housing Finance Agency, et al, 15-235.

Would counsel identify themselves for the record.

MR. ANKROM: Attorney Jeffrey Ankrom for Delinda Martins.

MR. FISCHBACH: Attorney Steven Fischbach also for the Plaintiff.

THE COURT: Good afternoon, folks.

MR. JOHNSON: Michael Johnson, Arnold & Porter. I've been admitted pro hac vice for FHFA.

THE COURT: Great. Welcome.

MR. JOHNSON: Thank you.

MR. BODURTHA: Good afternoon, your Honor. Sam Bodurtha on behalf of Fannie Mae and FHFA.

THE COURT: Welcome back, Mr. Bodurtha.

MR. BODURTHA: Good to see you again.

THE COURT: Let me apologize for not getting back to you. I realized I didn't get back to you as to what order we'd take up the things because I'm not sure there's a logical order to take them up in, and I tried like the Dickens to figure out what the logical order was to take them up and failed miserably.

So I think it makes sense, unless you folks have thought otherwise, to start with the Defendant's motion for summary judgment on the Counterclaim.

MR. BODURTHA: I was actually talking with my pro hac counsel, and we were considering whether the motion to dismiss should be heard. I leave it to the Court's discretion, the reason being that we are of the opinion that the actual act of filing the Counterclaim moots the due process issue. I don't know if that impacts the Court's decision on the order that you want to hear it.

THE COURT: Well, if you want to take the motion to dismiss up first, that's fine; but I think I probably want to begin with the Plaintiffs and ask them why I shouldn't grant the motion to dismiss in light of the foreclosure reversal.

MR. ANKROM: So we're starting with motion to dismiss, then?

THE COURT: Sure.

MR. ANKROM: Okay.

MR. JOHNSON: We're absolutely pleased to proceed that way, your Honor.

THE COURT: I mean, the papers are all made out here; but they're all done, I believe, prior to this consent agreement. The motion to dismiss, I mean, was

prior to the consent agreement on the foreclosure. So I'm wondering in light of that what's left of your affirmative claim.

MR. ANKROM: I think quite a bit, your Honor. Your Honor, the *County of Los Angeles v. Davis* states a general rule that voluntary cessation of allegedly unlawful conduct does not make a case moot unless, it has a two-step analysis requiring both steps, unless there's no reasonable expectation that the alleged violation will recur and unless interim relief has completely and irrevocable eradicated the effects of the alleged violation.

I'm not sure that any of the parties' briefs on these points were entirely clear. I don't believe that Fannie Mae has met either of those standards. There's a heavy burden on Fannie Mae to meet that, your Honor.

Your Honor, this case is not moot primarily for two reasons. Fannie Mae has not changed its official policy of engaging in nonjudicial foreclosures in Rhode Island.

THE COURT: Right, but vis-à-vis Ms. Martins, it's no longer a relevant issue.

MR. ANKROM: Well, I believe it is. And taking a look at the First Circuit case of *DHL Associates v. O'Gorman*, that's 199 F.3d at 50 at pages

54 to 55 -- I should recite the facts, your Honor.

DHL Associates was offering nude dancing at its fine-dining establishment; but the City of Tyngsborough, Mass., had a zoning policy that nude dancing could only be offered in Zone B4, and that zone didn't exist in the original zoning ordinance.

Shortly after litigation, Tyngsborough first amended their zoning ordinance and made two lots that were zoned B4, neither of which DHL Associates was involved in; and then at the District Court's suggestion, DHL (sic) expanded their zoning ordinance and created the B4 zone over 10 acres of land, and the Court -- the District Court held that that was constitutional.

The First Circuit reviewed whether it was moot, and they looked at two reasons. First, DHL Associates could not claim damages because the zoning ordinance was never enforced against DHL and, secondly, DHL could not bring a claim for declaratory judgment against a zoning ordinance that was no longer in effect.

On both of those issues, though, Delinda Martins' case is quite the opposite. She was affected by Fannie Mae's policy; her home was foreclosed on nonjudicially without a hearing; and because the policy is still in effect, she can bring the claim for

declaratory judgment against that policy.

She has a right based on her past injury to ask the Court for a declaration that these -- that this policy is violative of the Constitution.

There are many cases, I think, your Honor, that make a distinction between whether the official policy has been changed or not. For example, the *Rhode Island Association of Realtors v. Whitehouse*, a First Circuit case, 199 F.3d 26, involved the constitutionality of a Rhode Island statute that threatened criminal penalties for the commercial use of public records.

In that case, the Attorney General, both the past Attorney General when the case was brought and then the current Attorney General, argued that because they made certain representations during the litigation that they would not prosecute the Rhode Island Association of Realtors on the basis of that statute, the use of public records, then they said the Association of Realtors was not affected and that the case was moot.

But the Court noted that the Attorney General's universal policy regarding that statute had not been changed, and so the Court allowed the case to proceed to determine the constitutionality of the statute.

Similarly --

THE COURT: But in this case what we have is this position that you have on behalf of Ms. Martins and have had on behalf of other clients as well and the cases have gone away before they've been decided concerning the status of Fannie Mae and their effect of due process on that particular entity, and that issue has never been adjudicated because the cases seem to have settled and this one obviously hasn't, but your position on that is that they're required to give appropriate notice, however that would be defined under due process because they're a government entity and, therefore, I have to do it either by -- I suppose you'd concede either by judicial foreclosure or by properly noticed and fulfilling of all due process requirements under a nonjudicial foreclosure; right?

And if that's the case, don't we need a real case in controversy in facts to determine whether the Defendants are proceeding consistent with due process in the nonjudicial foreclosure area? And we don't have those here because we don't have a foreclosure to analyze.

MR. ANKROM: Well, I think because she was actually foreclosed on, your Honor, she has a right to seek the Court's determination, a declaratory judgment, that that was, in a fact, unlawful.

Also, I think there may be lingering effects from the prior foreclosure. Fannie Mae has not met its heavy burden to demonstrate that all of the effects of the foreclosure are gone.

For example, there may be costs and expenses that they claim she's contractually liable for that prior foreclosure. I'm not aware if those have been taken off of her statement or not. Fannie Mae has certainly not made a representation to this Court. I'm not aware whether these -- the notation of foreclosure was removed from her credit report.

But I'm sure if the Court rests on those issues, they'll just stand up and say, Well, we'll change those, your Honor. And I think that's the difficulty here, and that's what the Supreme Court was suggesting in the *Knox v. SEIU* case, that Fannie Mae is using this as a litigation strategy.

They're not admitting that what they did was wrong. In fact, they're continuing the practice of nonjudicial foreclosure in Rhode Island.

In the past cases, they've done everything that they could to avoid your Honor from reviewing this -- the constitutionality of their conduct.

THE COURT: All to the benefit of your clients.

MR. ANKROM: It has worked out well that way;

and maybe if your Honor denies mootness, it might make it difficult.

THE COURT: Mr. Ankrom, what I'm missing here is that, and maybe I haven't delved back into it in a while to the depth that I looked at it at one point before you ended up settling it, and that is I did not perceive your position to be that all nonjudicial foreclosures would be unconstitutional if the Court found that the due process requirements applied to Fannie Mae but, rather, their actions would have to be consistent with due process, if I believed your argument and, therefore, nonjudicial foreclosures could be done consistent with the Constitution.

MR. ANKROM: I don't believe nonjudicial foreclosures can be done consistent with the Constitution. The Constitution requires not only notice but also a hearing, which they're not getting.

I don't think that necessarily means that they need a judicial foreclosure. They could perhaps set up an administrative hearing. But this is not just an issue of this one foreclosure was done improperly.

This is an issue that Fannie Mae has an official policy that all foreclosures in Rhode Island will be done a certain way, and that way that they're requiring all foreclosures to be done violates the Constitution.

So if Delinda Martins ever owns property again in the future, which I think is foreseeable, and if Fannie Mae is or Freddie Mac is the owner of that mortgage, she will face the same possible foreclosure procedures because this is the way Fannie does it -- Fannie Mae does it in every case.

And I think that's what distinguishes this case from some of the invalid foreclosure cases my brother cites; that this isn't a case of an individual error on an individual foreclosure. This is a case of a universal policy that has not been changed.

Similarly, the *Knight v. Mills* case in the First Circuit, 1987, where Mr. Knight claimed that the Constitution required a psychiatric treatment program while he was incarcerated, which the Court didn't -- well, didn't reach, the Court dismissed the claim for damages because the officials had qualified immunity and dismissed any declaratory injunctive relief against these Defendants noting that he had received treatment.

This wasn't an issue of an official policy. They were offering treatment to some people. It's just rather in his individual case he was not receiving the treatment that he wanted.

And, in fact, in that case in Footnote 17 the Court noted that the claim for declaratory relief would

continue against other Defendants that were not party to the appeal.

Similarly, in *Preiser v. Newkirk*, which my brother relies on regarding whether future harm is speculative or too remote, the Court had already entered declaratory judgment in that case based on the past violation.

So I think all of these cases lead to the conclusion that when there is a past violation based on an official policy and that official policy has not been changed, the Claimant still has the right to ask the Court for a declaratory ruling on that past official policy.

Similarly, the *County of Los Angeles v. Davis*, the Court dismissed that case as moot because the official policy had been changed. The Court never found a racially discriminatory intent; and the 1972 promotional exam that the Plaintiffs were complaining about, the County of Los Angeles agreed that they would never use.

So it wasn't just they promoted these one or two individuals who sued but maintained that this 1972 test would still be used. No, they changed their policy. They threw out the test completely.

So to just fix it for one individual who sues

but leave everybody else harmed is merely a litigation strategy designed to avoid the Court from ever reaching the ultimate issue.

And the Supreme Court has frowned on that, and the First Circuit frowned on it in the *Rhode Island Association of Realtors v. Whitehouse*.

THE COURT: That Supreme Court case -- I think it's a Supreme Court case relatively recently in the class action context where one of those Courts, someone above me, disallowed Defendants in a class action from picking off Plaintiffs, representative Plaintiffs, to moot an issue, and I think they allowed it to go forward. Is that an analogous legal concept?

MR. ANKROM: I think that's analogous. We haven't brought a class action. Unfortunately, Legal Services is prohibited from bringing a class action; but I think that's what's going on here, is that if your Honor declares this to be moot, every case we bring against Fannie Mae and Freddie Mac, they're going to follow the same procedures that they did in this case, which they've already done in some of the others.

They're going to rescind the nonjudicial foreclosure voluntarily and then file a motion to dismiss that the case is moot because they gave everything we wanted. They rescinded the nonjudicial

foreclosure -- I have "speak slowly" written at the top of my page in bold letters just for your benefit.

THE COURT: You need to look at it every so often to make it effective.

MR. ANKROM: That they will claim in each case that because they rescinded the nonjudicial foreclosure and apparently merely state an intention to pursue a judicial foreclosure, that your Honor cannot look at this issue.

And that's going to happen over and over again, and Fannie Mae will continue with what we believe is unconstitutional conduct, and we can't bring every case.

THE COURT: Let me hear from the Defendants on the mootness issue because -- let me hear from the defense on this issue.

MR. JOHNSON: Thank you, your Honor. The case is moot. I don't think there's any real dispute that if the Plaintiff were bringing the case today, she would lack standing. The foreclosure has been undone. There's nothing for the Court to decide here.

THE COURT: Do you know whether the notation has been taken off Ms. Martins' credit?

MR. JOHNSON: If that had been in their brief, I would have been more prepared to look into that. It's

not something that was raised until a few minutes ago. So I'm happy to follow up on my friend's comments, but I don't know for sure.

I don't think it matters here because the key element, as both parties focus on in the briefs, is whether there is a reasonable expectation that the challenged conduct can be repeated.

The challenged conduct in this case, according to the four corners of the Complaint, is not some policy and practice. It's conduct that related to this Plaintiff and this property.

If we look at the relief requested, it's undoing this foreclosure. It's protecting this Plaintiff's purported due process rights.

Now, if we ever got to the merits, of course we have plenty of arguments about that; but the challenged conduct relates to this Plaintiff, and we know that the challenged conduct won't be repeated because this action isn't going to end.

This isn't a case where a Defendant tries to stop the Court from looking at the relationship between the Plaintiff and Defendant. We've not only suggested, not only committed to do a judicial foreclosure, but we've done it, and we've pursued it to the point of seeking a summary judgment from your Honor.

So the Court can be as assured as any Court could possibly be that there will not be a repeat of whatever supposedly might have gone wrong in the nonjudicial foreclosure process.

And let me say it would be, in my view, extremely difficult for the Plaintiff to try to broaden the case because this really doesn't fit that kind of pattern and practice paradigm because the Plaintiff did get notice. That's in Exhibit 14 to the Complaint. The Plaintiff got a letter saying, Your home will be foreclosed.

THE COURT: The question is whether the notice is adequate pursuant to paragraph 22 of the mortgage or not, not whether the notice was received.

MR. JOHNSON: I think it's really the adequacy of the hearing process. You know, this is a case about specific facts, about whether -- there's clearly notice of the foreclosure, whether the notice was perfect, substantially compliant or otherwise, whether whatever hearing process there may have been, and I know there was a website and an 800 number provided in the notice, I don't know, it's not alleged in the Complaint one way or the other whether the Plaintiff actually tried to raise any of these issues before the nonjudicial happened, but whatever may have gone on there, those

just aren't things that I think could be generalized.

And there's certainly no allegations and there's no request to declare anything, any policy or practice wrongful. It's all focused on this Plaintiff, this property, this foreclosure, which has already been undone. So the case is moot. It's very interesting that --

THE COURT: Actually, their first request is, they request a declaration that Fannie Mae and FHFA's use of nonjudicial foreclosure process in Rhode Island or any foreclosure process, blah, blah, blah, violates the Plaintiff's Fifth Amendment due process rights.

MR. JOHNSON: The Plaintiff's Fifth Amendment due process rights, and so it's tied to what happened in this specific foreclosure.

And the allegation of what went wrong, again, is she got notice, and it's something that happened after the notice is where the allegations are. So that, I think, is just not something where the Court could say, Look, based on something that happened after you got notice, there's some policy or practice.

So this isn't what I would consider, if the Court wants to put it into a paradigm that I think the Court was sort of touching on and that my friend was also alluding to a little bit, this isn't a facial

challenge. This is more of an as-applied challenge.

And an as-applied challenge relates to specific facts, specific circumstances, specific acts. If those are fixed, you don't get to continue to pursue your as-applied challenge.

And it's interesting, there's a case that wasn't cited in the briefs. It's called *New England Regional Council of Carpenters v. Kinton*. It's a First Circuit decision at 284 F.3d 9.

And in that case, the as-applied challenge was ruled moot, but a facial challenge was ruled not moot; and the same kind of dynamic was going on. It wasn't an ordinance. It was a policy about leafletting. And the Plaintiff had leafletted in one location, but the Defendant decided to allow them to go ahead and continue, notwithstanding the fact that the policy arguably prohibited it.

So the Court said, Well, look, you got to leaflet in the location where you were doing it. Your as-applied challenge is moot, but you can make your facial challenge to the statute or to the policy.

That's not what we have here. We have only claims relating to a single foreclosure. And while my friend wants to talk about employment practices cases and nude dancing cases and whether criminal penalties

for misuse of public records cases have something to tell us here, we don't really need to go there because we've got plenty of law on the question before the Court today whether the rescission of some portion of a nonjudicial foreclosure process moots claims relating to the nonjudicial foreclosure.

We've got the *Staton* case. We've got the *Vettrus* case. We've got the *Sakagawa* case. We've got the *Tamburri* case. There are others I could list that aren't enumerated in the briefs; but these Courts all look at this exact question, many of them in the context of an assertion that, wait a minute, it's just voluntary cessation. It's just voluntary cessation, so I should get to make my case about what went wrong with the foreclosure.

Those Courts all say, No, you've gotten the nonjudicial undone. If something else happens, something else goes wrong and you really shouldn't be foreclosed upon at all, let's, by all means, have that dispute. Let's not say that you can't make that case, but let's have it in the context of a live case or controversy.

And I owe it to the Court to say I think this really is an Article III issue, and they're asking for an advisory opinion on a hypothetical state of facts

when they say, Well, maybe we'll buy a different property and maybe there will be another nonjudicial or, you know, maybe there's some other set of circumstances that might come up in the future.

That's the exact analysis that the Courts went through in *Staton* and *Sakagawa*, in *Vettrus* and in *Tamburri*. Those are all cases, by the way, where the rescission happened while the case was pending.

So the notion that there's something wrong, something sneaky or suspicious about trying to resolve the elements that we can resolve and narrow the dispute before the Court during the course of the litigation, that's just totally contrary to the cases that are most analogous to the facts here and that my friend completely ignored in the briefing. There's not one word, one word about any of those cases in the entire brief.

Now, the First Circuit has spoken to it, the *DHL* case. They say that the exception, voluntary cessation, applies, however, only when there is a reasonable expectation that the challenged conduct will be repeated.

So certainly the statements about it being a heavy burden are out there. I agree with that. There's a doctrine. It's our burden. I get that. The

keyword is "reasonable expectation" here.

And I would also just note that my friend, because I think he's so committed to his view of the case, left that out entirely when reciting the standard near the conclusion of his brief on page 7.

Instead of asking the Court to apply the real standard, he said that it was our burden to show it was absolutely clear that Plaintiff will never be subjected to Defendant's purportedly unlawful conduct. That's just not the standard.

And so what that shows is that, yes, there's a doctrine and, yes, it sometimes applies; but it's very easy to get drawn into thinking any time you can spin out a very speculative course of events where somehow some related conduct might take place, that's enough to make a moot case live. Just because you can go through that sort of thought process doesn't make it right.

THE COURT: What about their claim for damages?

MR. JOHNSON: I don't see one in their prayer for relief. I see it in the caption of the Complaint.

THE COURT: It's in the caption, but it's also at the end of -- at page 17 into 18, sub 4, for a meaningful hearing prior to deprivation and opportunity to recover damages if a foreclosure is deemed erroneous.

MR. JOHNSON: So that's a request for a PI and a permanent injunction, and so this -- speaking injunctive relief, there's also no allegations in the Complaint that support any kind of damages. There just isn't a damages section in here.

So I don't see a damages claim, and there's not a demand. So I just don't think that's part of the case right now.

This is a case where the Plaintiff asked to have a nonjudicial foreclosure undone. They've gotten that. If they should be -- and they have, look, issues with whether Fannie Mae can foreclose or not. I get that.

This isn't going to end the case. There is going to be proceedings about whether the judicial foreclosure can go forward. Let's have that. Let's debate what's really in dispute and let perhaps another case before your Honor or one of the many other cases before other tribunals that have gone to judgment on this issue -- there's some suggestion that Fannie Mae never lets these cases go to judgment. That's just a -- a cursory search of West Law would show that's not the case.

So let's let this case go forward on what's really in dispute, not what's not in dispute. And if one of the other cases before your Honor or some case

yet to be brought raises issues that we can't resolve amicably, so be it.

I also just -- you know, the suggestion that this is a strategic litigation tactic is a little different from the cases where that was a concern of the Court.

It's a legitimate concern because there are circumstances where a Defendant can sort of surprise the Plaintiff and try to, you know, pull the rug out without the Plaintiff's participation or assent. That's not what happened here. When we moved to rescind the foreclosure, the Plaintiff assented.

THE COURT: Why did you move to rescind the foreclosure?

MR. JOHNSON: Why? Because we want to narrow the dispute and present issues that really are in dispute. If we can focus --

THE COURT: Do you acknowledge that the notice was improper?

MR. JOHNSON: No.

THE COURT: Why would you rescind the thing if it wasn't a litigation tactic?

MR. JOHNSON: Because they have other issues that we think are worthy of litigating, and we want to focus --

THE COURT: Like what?

MR. JOHNSON: We want to focus the case on what's really important.

THE COURT: But you rescinded a foreclosure that you spent money on, Mr. Johnson. And it seems to me that if Fannie Mae has made a decision to rescind the foreclosure, they either did it because they're acknowledging that the notice was improper, which we'll get to when we hear the summary judgment motions, or they're making a litigation strategic decision to take an issue away from me that they don't want decided or whatever other litigation matter would come down the pike; but it's got to be one of those two.

MR. JOHNSON: Look, I think that the way Fannie Mae proceeds with all contested foreclosures is inherently a case-specific analysis, and they are going to look -- and, unfortunately, some of those things don't percolate up.

THE COURT: Mr. Johnson, what was the case-specific analysis in this case that caused Fannie Mae to undo a foreclosure? Was it the notice?

MR. JOHNSON: No.

THE COURT: Then what was it?

MR. JOHNSON: The course of the litigation, your Honor. We think that we want to litigate and get the

foreclosure resolved as quickly as we can, as certainly as we can, without needing to litigate extraneous issues.

The Plaintiff has other concerns here, and we want to resolve those. Those are the things that we think we can't really amicably resolve. We wouldn't expect them to assent to some sort of judgment that Fannie Mae was the mortgagee.

That seems to be one of their major concerns here, is that the mortgage is recorded in a servicer's name rather than in Fannie Mae's name.

That's something we can agree to disagree about. We need to have that fight because we need to get over that hump in order to complete the foreclosure or have it be deemed that we can't complete the foreclosure.

We don't need to fight about the notice and the nonjudicial foreclosure because we've got an option, and we're trying to do that efficiently for the Court and for Fannie Mae and for the Plaintiff.

THE COURT: We're going to argue over the notice portion very shortly, in a matter of minutes. I understand what your position is, but the Plaintiff's position is that we'll go back to that.

So I'm going to take the motion to dismiss under advisement. If I determine that the matter is moot,

you'll hear from me. If I determine that the matter isn't moot, I'm going to request further proceedings, I don't know what they'll take, under the substantive issue that underlies the matter.

MR. JOHNSON: Thank you, your Honor.

MR. ANKROM: Can I have a chance to respond to some of the things, please.

THE COURT: Sure.

MR. ANKROM: Thank you. I'll keep this brief. I do agree with the *New England Regional Council of Carpenters v. Kinton* case which my brother cited. That's 284 F.3d 9. It's a First Circuit case of 2002.

And, once again, the portion that was deemed to be moot was because the Mass. Port Authority had changed its official permit policy. The portion that was remanded for further proceedings was because they changed their policy with regard to, I think it was, Northern Avenue. It was remanded as to whether they had changed their policy with regard to other streets, whether leafletting would be applied there.

THE COURT: So that there was still, to use the term, there was still a case in controversy as to them; but here what Fannie Mae's position is is that vis-à-vis Ms. Martins, that once the foreclosure was rescinded, these matters are of no relevance to her

immediately. It may be possible into the future, but the Court doesn't give advisory opinions usually, ever.

MR. ANKROM: Correct, but actually the NERCC had not shown any intention to distribute leaflets on any of these other streets. So I'm not sure that there was any immediate threat of any violations there.

But, again, I believe that Ms. Martins, since she did suffer harm from the past action, has a right to seek declaratory judgment. That's what the *DHL Associates* case said. That's what *Knight v. Mills* said.

I would point out in that regard that our Complaint is not just seeking relief in regards to this one foreclosure. We mentioned the servicer alignment initiative, a policy issued by Fannie Mae which we cited also in our objection to their motion to dismiss, we attached the Exhibit 1 to that, which is the policy by which all foreclosures in Rhode Island should be done through nonjudicial process. So it's not just an as-applied challenge like my brother says. It is a facial challenge.

I would note, though, if we prevail on the summary judgment, I think that also would change the moot analysis because if we prevail, then they can't pursue the judicial foreclosure at this time. I think

that should affect your Honor's considerations. That's all. Thank you.

THE COURT: Thanks.

Mr. Johnson or Mr. Bodurtha, who is going to argue? Mr. Bodurtha.

This is now the Defendant's motion for summary judgment on its Counterclaim for judicial foreclosure if I've got my map well read.

MR. BODURTHA: Thank you, your Honor. I appreciate your following the map that I suggested. I know I threw a curve ball at you in that regard.

THE COURT: You know, in retrospect, it made perfect sense. Thank you for that.

MR. BODURTHA: Well, thank you for entertaining the suggestion.

Your Honor, we've been talking about this issue, the notice issue. I'm not going to go into great lengths in terms of the entirety of the summary judgment motion.

In terms of the stated facts, there is absolutely no dispute that Delinda Martins defaulted on her mortgage. She admits to that fact. There's no dispute that she currently owes over $300,000. Delinda Martins has not raised --

THE COURT REPORTER: Could you please slow down.

MR. BODURTHA: I'm sorry. I should have written on top of my note. I would steal Jeff's notepad, but --

THE COURT: It wasn't very effective. Actually, though, what you didn't see is that I got thrown the glance, too, at one point.

MR. BODURTHA: Oh, so it was a response thing?

THE COURT: It fed on all of us. So I just didn't want you all to think that you're alone in this defect that we have in how we proceed. We all owe Karen an apology.

MR. BODURTHA: I will talk as slowly as possible. Feel free to glare at me if I speed up.

What is at issue in this summary judgment motion and in response to our motion and the cross-motion is whether the notice of default compliant with paragraph 22 of the mortgage was delivered to the borrower, Delinda Martins.

THE COURT: Well, doesn't it go beyond that? Doesn't it go to whether the notice of default complies with paragraph 22 under either a substantial compliance or under a strict compliance analysis?

MR. BODURTHA: Yes.

THE COURT: Because I don't think, and maybe they can correct me if I'm wrong, I don't think there's

any question about it being sent in and it being received.

MR. ANKROM: That's correct. We're not raising that issue.

THE COURT: Right. Just so that I'm clear as well on this roadmap of this case that you all have put before me, the Plaintiff -- one of the issues the Plaintiff raised was who sent the notice.

MR. BODURTHA: Correct.

THE COURT: That came from the servicer, Green Tree.

MR. BODURTHA: It did.

THE COURT: And during the conversation we had --

MR. ANKROM: Your Honor, we're going to drop the issue of who sent the notice based on your case of the 252 Wolf Rock as well as William Smith's. There are other issues we'd like to address on this which are in our brief.

THE COURT: Great. So I was going to say that's not an issue at least vis-à-vis me because I've already ruled that agents of the mortgagee could give the proper notice pursuant to paragraph 22 and use of the power of sale.

The question that I've got is even -- let's put

the standard aside, substantial versus strict. The one piece that seems to be missing, Mr. Bodurtha, and I know there's a couple others Plaintiff raised, but the one that I'd like you to talk about is the right to bring a court action concerning default or any defense because from what I understand between the parties is that that provision of paragraph 22 of the mortgage, you claim the Defendant's claim is satisfied by the statement in the February 11th, 2014, notice from Green Tree that says, "You may also have the right to assert in the foreclosure proceeding the nonexistence of a default or any other defense available to you."

Let me just ask, do I have that right that that's one of the issues?

MR. BODURTHA: That statement within that notice of default that was issued to Ms. Martins was Green Tree's compliance with paragraph 22's requirement that the borrower be communicated that he or she has the opportunity to initiate action in order to challenge the validity or underlying defenses of the foreclosure, and I'm paraphrasing paragraph 22.

THE COURT: Sure. How does it do that? I guess what I don't understand, and this is, I think, my twelfth hundred mortgage foreclosure case --

MR. BODURTHA: I'm just behind you in that

number.

THE COURT: I was going to say, you've been at many of them.

MR. BODURTHA: I understand your position in that regard.

THE COURT: Paragraph 22 is a relatively standard paragraph in mortgages; correct?

MR. BODURTHA: It is, and it certainly lends itself to how the servicer or the lender is to communicate with the borrower in terms of the notice of default and opportunity to cure.

THE COURT: Sure. So it seems like it's a relative cut-and-paste possibility that could easily be done to comply with your contractual obligation under the mortgage at paragraph 22 to say what you've agreed to say prior to acceleration.

It's not rocket science to say to the borrower in this standard letter that a computer throws out that they have, quote, "the right to bring a court action to assert the nonexistence of a default or any other defense a borrower to acceleration and sale."

Yet, you know, as I went through my checklist going through this of what you're required to say under 22, and I know the Plaintiff will raise a few others, but I -- oh, there it is, check; oh, there it is,

check; oh, there it is, check, on issues like the action required to cure the default, the date not less than 30 days. I know there's a thirty-first-day issue Plaintiff wanted to raise, but failure to cure can result in acceleration, et cetera, et cetera.

And then I come to the court one and actually gave it to my clerks and I said, I'm missing something clearly. Where is it in here? And no one could come up with it. And then we went back and read the briefs and found out what your position is.

But just at a practical level, why don't they comply with the very simple language of paragraph 22? I know you claim it's substantial compliance, but --

MR. BODURTHA: Well, I do think they comply with it. Sorry. I do think that they comply with the provision, and they give the borrower in default the opportunity to initiate court action, and that is actually what happened in this case.

I can't answer for the Court the practicalities of why a servicer is not just cutting and pasting. I don't think it's necessary in order to demonstrate compliance with paragraph 22.

I don't think even if you look at the Massachusetts SJC cases and the federal cases where they're discussing strict compliance, which is not in

this jurisdiction, that those Courts have said in order to strictly comply, you need to cut and paste this provision within paragraph 22 into the statement.

The Courts in those jurisdictions where strict compliance is available have looked at the totality of the notice and interpreted that notice to decide whether there is, in fact, compliance.

THE COURT: So why, if you agree to tell the borrower that they have a right to go to court, which has a real vernacular meaning to all of us, it means you have a right to go to court, therefore, go get yourself a lawyer, is how I would read the notice requirement, and that doesn't do it, why shouldn't I guess that they don't want to do that because they don't want people suing them and that it's a purposeful action to avoid what they agreed to do, which is tell people they've got a right to go to court to challenge this and particularly in a nonjudicial foreclosure state so far?

MR. BODURTHA: Well, I wouldn't -- two responses to that. One is I wouldn't have the Court guess at it. I don't think that there is any attempts to convince borrowers or somehow skate around the requirements of providing the notice of default.

I think that the exhibit that we're reviewing

and that particular notice of default gives or gave Delinda Martins the information that she needed and gave her those provisions under which she could raise action.

THE COURT: But, Mr. Bodurtha, what other provision -- every box was checked almost word for word of standard paragraph language 22 except the notice that you have a right to go to court, a rather simple, straightforward statement of a person's right; and that's the one provision that's missing word for word, whether I determine it's compliance or not, we'll make that decision down the line, but that's the only provision that there's not a check box done for.

And how can I not come to the reasonable assumption that it's a purposeful action on the part of the mortgagee in these kind of instances not to let people know they've got a right to go to court when they agreed to tell people they had a right to go to court in these kind of situations?

And if that is the case, if I can assume that it's a purposeful action on behalf of the mortgagee, how is that not substantial or nonsubstantial compliance?

MR. BODURTHA: I don't believe there's any evidence before the Court of a purposeful attempt made

by Fannie Mae in order to somehow not communicate that information to the borrower, and I also believe that the borrower as a signatory and a party to the mortgage agreement certainly has paragraph 22 at her reach and understands under paragraph 22 that she does have the right to bring a court action.

THE COURT: Well, she also understands that you're going to give her notice of that.

MR. BODURTHA: And I believe and it's our argument that she received that notice. If she truly thought that she did not have the opportunity to bring a court action, I'm not sure we would be here.

And if she received her notice and was somehow confused by it, certainly the mortgage agreement itself within paragraph 22 would give her the comfort and confidence in knowing that she does have the right to bring a court action in response of a notice of default and right to cure.

THE COURT: What does this sentence mean, you may also have the right, not that you do, but you may also have the right to assert in the foreclosure proceeding? What proceeding? Where are they going to assert what?

MR. BODURTHA: Well, actually, I think that that is an accurate statement of what happens in this

jurisdiction. It is the fact that you can have a foreclosure proceeding that's a judicial foreclosure or a nonjudicial foreclosure.

Even in the event of a nonjudicial foreclosure, I would still argue to this Court that there is a proceeding. There's notices that have to be issued, there's filings within newspapers, and there's an auction that takes place on your front lawn.

THE COURT: None of which involves a court.

MR. BODURTHA: I understand that. And Fannie Mae, as well as other lenders and servicers and agents, have the ability to -- in this jurisdiction to initiate foreclosure under the power of sale.

We've discussed that numerous times; and you've had lawyers in front of you who have said, Your Honor, they ought to just proceed judicially; and you've said, They don't have to, though. I'm not the legislature. They have that opportunity.

So if you actually consider what that sentence says, it's accurate. You have the right to assert in a foreclosure proceeding the nonexistence of the default. The borrower has that right.

That issue actually is not in this case because she's not challenging the default, but she has filed suit against her servicer and her lender challenging

the foreclosure proceeding.

So, to me, and I understand the point the Court is making, but I think that when you look at the notice as a whole, when you look at the mortgage agreement, both of which were available to her, certainly that opportunity was communicated to her and she took advantage of that opportunity in an effort to halt this foreclosure.

THE COURT: You're saying in many respects it's substantial compliance with paragraph 22 because Ms. Martins did exactly that which we were required to tell her she had the right to do and that, therefore, reading of the notice worked.

MR. BODURTHA: It's difficult not to argue substantial compliance when we're on the opposite ends of a lawsuit that challenges the foreclosure itself.

Even if you went into the strict compliance jurisdictions, the same result happens. We have a lawsuit that emanates out of the foreclosure. We have a borrower that wants this Court to apply Massachusetts law and rule that this notice is not sufficient.

The notice was given to her. The totality of a judicial foreclosure and what we're here for today is to demonstrate that the notice of default was given to the borrower and that she has had the opportunity to

come into court in response to a complaint to foreclose and to raise any of these issues that she may have.

And this is where I differ with my brother on the applicability of this law. How is it that we can take strict compliance cases, cases that emanate from the power-of-sale foreclosure, cases where the Massachusetts Supreme Judicial Court starts off in the *Pinti* decision and says, We've got an issue here in Massachusetts, we've got lenders that are foreclosing under the power of sale, these people don't have the opportunity to come into court and because of that, under our power-of-sale statute and because the power-of-sale statute demonstrates or requires compliance with the mortgage, we're going to make that strict compliance?

Now we come down here into this case, we're sitting in a judicial foreclosure. We're not foreclosing by notice. We're not giving her the opportunity to come to the front lawn and witness an auction within weeks of having that notice of sale.

We filed a Counterclaim lawsuit against the borrower in order to proceed on a judicial foreclosure. The question for the Court is, under paragraph 22, did the borrower receive those notices, has she received those notices before we are in front of this Court

demanding that we be given judicial authorization to foreclose.

You cannot take the power-of-sale foreclosure decisions and simply apply them down here. You don't have the same policies behind it. I know my brother argues, well, strict compliance, I mean, it's in Massachusetts. It's in other jurisdictions.

I have not seen a case in this jurisdiction, nor do I think there is a case, that is similar to these circumstances where you have a judicial foreclosure that is taking place and the borrower has filed an affirmative piece of litigation and the borrower is somehow demanding and informing this Court that she didn't get all of this information.

All of the information has been communicated to her. And, more importantly, when she comes into this court and files lawsuit and says, I want notice and an opportunity to be heard, I'm challenging this foreclosure, that's exactly what we gave her.

We filed a Counterclaim. We've requested that the Court review the foreclosure, the notices, whether she was in default, whether the notice -- whether there was compliance with this mortgage agreement. We've given the Court the evidence that would demonstrate that.

The question is not simply whether a notice went out before a power-of-sale foreclosure, which is what the SJC dealt with in *Pinti* and what this Court and other Courts in our jurisdiction deal with week in and week out with these power-of-sale foreclosures.

This is a different kind of situation. This is a situation where we're before the Court on a judicial; and under those circumstances, I have great difficulty in applying those other cases and demanding the strict compliance when the basis of those other cases and the demand for that kind of compliance is the concerns over a power-of-sale foreclosure.

If we remove all those concerns and we take this as substantial compliance, we ask is she in default? Yes. Has she failed to cure? Yes. Was she given notice of default and her right to cure? Yes. Did that timeframe pass? Yes.

Was she given notice that she has the right to assert in a foreclosure proceeding the nonexistence of a default? She was given that notice.

Does she have the mortgage agreement in front of her? It's hers. Does it tell her that she could file a court action in order to challenge the validity? It does. Did she file that court action? She did.

Under all of those circumstances, that's the

precursor under paragraph 22 to Fannie Mae coming into court and saying, I've complied, I want a court order that I can proceed with foreclosure.

THE COURT: Thanks, Mr. Bodurtha.

Mr. Ankrom.

MR. ANKROM: Your Honor, I think a lot of your questions, a lot of your reasoning are similar questions to what Judge Finkle raised in the *In re: Demers* case in Bankruptcy Court here in Rhode Island.

My brother has not addressed *In re: Demers* in any of his briefs, and he seems to be avoiding that case.

THE COURT REPORTER: Could you please slow down.

MR. ANKROM: That was about a minute in. I didn't make it very far.

THE COURT: No, Karen's just getting bolder.

MR. ANKROM: Your Honor, in that case, again, the notice did not say the borrower had the right to bring a court action. It said you have the right to argue that you did not default on your mortgage, and Judge Finkle asked the person the question that you asked, too: Argue to whom? To the lender?

My brother says that there is foreclosure proceedings even without Court intervention. And then, again, who would the borrower argue to? The

auctioneer? That's not going to go very far.

THE COURT: But what Mr. Bodurtha argues, amongst many things, is that when the judicial foreclosure route is gone, that we're in court, and whatever protection the borrower gets from being in court they're going to get from being in court under a judicial foreclosure process; and, therefore, the -- I refer to it internally as the sixth requirement, but that's just because of my little checklist of paragraph 22. I don't know why they said you have to say A, B, C -- 1, 2, 3 and 4 and then you also have to say these other two things and don't give them numbers, but anyway, the sixth requirement of the notice on your right to go to court is meaningless in a judicial foreclosure setting and, therefore, they've substantially complied with paragraph 22 because we're in court.

MR. ANKROM: Well, no Courts have held that, your Honor. I know they've asserted it.

THE COURT: Well, why wouldn't they? Why isn't that logic, Mr. Ankrom? Why doesn't that logic make sense if this Court -- let's forget the standard, whether it's strict or substantial.

Let's just say why isn't that logic that that section of paragraph 22 in a judicial foreclosure

setting a meaningless enough provision that compliance with all the others equals substantial or even strict compliance?

MR. ANKROM: Because, as Judge Finkle has stated, this is a condition precedent to the valid exercise of foreclosure.

In fact, the express language of paragraph 22 says that the lender must comply with paragraph 22 before exercising the power of sale or any other available remedies at law.

The judicial foreclosure statute, 34-27-1, says that any person entitled to foreclose may proceed by court action.

Until they have complied with paragraph 22, they are not entitled to foreclose. *Bucci v. Lehman Brothers Bank*, the Rhode Island Supreme Court says the power of sale does not exist apart from the terms of the contract. They simply don't have the right to accelerate the debt and to foreclose until they have complied with paragraph 22.

USA Residential Properties v. DiLibero, Justice Rubine of the Superior Court says that the mortgagee must comply with both statutory and contractual requirements.

Your Honor, I have cited in my brief numerous

judicial foreclosure states that require compliance with paragraph 22. Not all of them say whether it's strict or substantial. That's not the issue.

THE COURT: And none of them, from my read of them, and the ones that I went on and read in full talked about this particular provision, the going-to-court provision, which is, in essence, one of Mr. Bodurtha's more powerful arguments that that particular provision in this particular instance is different than would be all the others because we're here. We're in court --

MR. ANKROM: But that's just --

THE COURT: -- in a judicial foreclosure setting that gives all of the rights that that subsection 6 of paragraph 22 would have otherwise given to the borrower.

MR. ANKROM: But that's just not -- that's not what paragraph 22 says. That's not the analysis that cases have taken.

The question is whether the lender has complied with paragraph 22, whether they have satisfied a condition precedent to the exercise of foreclosure or any other remedies at law; and in this case they have not because they did not use the correct language, they did not advise the borrowers of the correct rights.

So I guess my brother is saying that when they "oops" and they give the wrong notice, can they now correct it by bringing a court action? There are no cases that say that. That is not what paragraph 22 says. Paragraph 22 says the borrower must be advised of her right to bring a court action.

And just like Fannie Mae does not want your Honor to assume that they gave the wrong notice in an effort to trick the borrowers, I would argue that your Honor should not assume the borrowers have the mortgage readily available.

Many people don't. Many people don't know how to read the mortgage, many lawyers don't know how to read the mortgage, and would not be able to search through paragraph -- page 9 or 10 of the mortgage to find paragraph 22 to say, Oh, I guess I do have a right to bring a court action. I didn't know that. That's just not the way many cases go.

Your Honor, my brother says that they don't need to cut and paste, and they may be correct. If they're using the language your Honor says, "the right to go to court," that would probably be sufficient; but there's a big difference between the right to go to court and the right to bring a foreclosure proceeding. Just like Judge Finkle said, it does not advise regarding the

right to bring a court action.

THE COURT: Actually, the notice doesn't -- I think if the notice said you have a right to bring a foreclosure proceeding, maybe that would be a little different.

It doesn't say that. It says you may have a right to assert in a foreclosure proceeding, nothing about the borrower's affirmative right to bring an action.

MR. ANKROM: Correct, which it seems that my brother was even confused. It says the foreclosure proceeding must mean the auctioneer going out in the front lawn and so now the borrower has the right to assert during that auctioneer proceeding about defenses. Wait a minute.

THE COURT: I think his interpretation is a proceeding can reasonably be read to mean process, the foreclosure process, which has various steps that are very similar to a proceeding.

MR. ANKROM: So I do believe strict -- a strict compliance standard should be applied in Rhode Island. That is not a unique issue of Massachusetts law. I did cite to other jurisdictions that have a strict compliance standard, and I believe Rhode Island would as well both with the language in *Bucci v. Lehman*

Brothers Bank that the power of sale does not exist apart from the conditions in the contract as well as an analysis of Rhode Island law.

I cite to *Headco v. Blanchette*, which required strict compliance with the notice requirements of a lease before the lease could be terminated, as well as another case that I'm searching for, *Capuano v. Kemper Insurance Company*, which required strict compliance with insurance policy before notice of cancellation can be sent.

Your Honor, I think this is pretty universal now in Rhode Island. When there's a condition precedent to terminating a person's rights under the contract, strict compliance is required.

I would argue that the February 11th, 2014, notice is the closest. Whether that notice or all the others fail in three points, the one your Honor has mentioned I think is the strongest and the clearest, that it does not advise of the right to bring a court action.

Secondly, it does not advise of the right to reinstate after default. Instead it says, let me find it, Please review your mortgage or deed of trust for any right you may have to reinstate your account after acceleration, and it goes on, earlier to the prior of

five days before the sale of property or, B, entry of judgment in force and security agreement.

This is very confusing language. I don't think this really advises a borrower of what they must do. It doesn't say that she has the right to reinstate after acceleration.

It says look for one of two documents, one of which doesn't exist, read them for yourself and determine for yourself whether you have any right to reinstate.

There is no deed of trust here, your Honor. I think we can -- we cannot assume that all borrowers have their mortgage readily available or even if they know how to go get it at the town hall. And that is why paragraph 22 says not they should be told check your mortgage to see what your rights are but, rather, you do have the right to reinstate after acceleration. This language is just confusing, and it doesn't advise regarding the rights.

And, thirdly, your Honor, paragraph 22 requires the lender to specify a date not less than 30 days from the date the notice was given to the borrower by which default must be cured.

This notice says within 30 days from the date of this notice, you may cure your default. There are two

problems with that. First, *Headco v. Blanchette* addressed this similar language. It defined "specify." "Specify notice" means you must give a calendar date, not that was 10 days from the date of this notice. It doesn't require someone to read the notice and calculate how many days. It says you must specify a date, give an exact date.

And also I think based on the *Frey* case that I cited in my brief, within 30 days of this notice is actually one day less than what is required because *Frey* says "within" includes the date the notice is sent. So within 30 days is the date the notice is sent plus 29 days more for a 30-day total period whereas paragraph 22 says a date not less than 30 days from the date the notice is given, which is the date of this notice and 30 more days, for a total period of at least 31. So we're one day shy, and we did not specify the exact date.

Your Honor, this notice simply does not comply with paragraph 22. The lender has not exercised a condition precedent; and as your Honor said a couple times, it's not that hard to do so.

They fully have the power of changing their computerized form and sending it out. They have the mortgage in their computer system. They know what it

says. They can send this out. They didn't do so. They should not be permitted to foreclose. Thank you.

THE COURT: Mr. Bodurtha, do you want to reply?

MR. BODURTHA: Yes, your Honor. Thank you. I didn't raise *In re: Demers*. I didn't because it's a power-of-sale foreclosure.

I understand what Judge Finkle's point is, but I would rely upon the argument I made to you before, which is we're not dealing with a power-of-sale foreclosure right now so we can't take the decisions that have been issued in connection with a power-of-sale foreclosure and apply them to a judicial foreclosure.

In terms of the *Headco* case, *Headco v. Blanchette*, at least my understanding of it is dealing with a notice of tenancy termination. You're in a landlord-tenant situation. I've spent way too much time in the Sixth Division District Court on this very same issue.

And as much as I hate that 30-day notice and my local counsel sending it out on a Friday and it doesn't show up until whatever day, there is a different concern than we have here.

The concern is, it's saying you've got 30 days to move your stuff out of your house; and if you don't

move your stuff out of your house, we're going to file a summary process action against you, and then we're going to forcibly remove you from your house.

This is not the same kind of scenario here. This is a scenario where we say you're in default. Here is the amount of money you're in default. You have 30 days to cure. If you don't cure within those 30 days, your loan will be accelerated and foreclosure may occur.

It is a notice given under the terms of the mortgage to allow the borrower to reinstate. This particular notice alerted her of the fact that she owed over $90,000 and she needed to cure that default within 30 days to avoid acceleration and foreclosure. This is not a notice of termination. This is not information telling her you're going to have to leave.

I think that I can understand what my brother is arguing about strict compliance, but I don't think that the *Bucci* decision says that. Just because a Court says it's a condition precedent, that does not require strict compliance.

And my concern with adopting the strict compliance is we're taking the *Pinti* decision and we're bringing it to Rhode Island. The *Pinti* decision is a power-of-sale foreclosure.

In addition, and you and I have actually discussed this almost three years ago to the day, what is the difference between the Massachusetts power-of-sale statute and the Rhode Island power-of-sale statute.

And I was sitting over in that chair wanting to get up and kick and scream because some of my colleagues said, Gee, your Honor, I'm not entirely sure.

I can tell you the power-of-sale statute in Massachusetts says first comply with the mortgage. And from that decision and from the *Ibanez* case, which is another Mass. SJC case, the Massachusetts Supreme Judicial Court in *Pinti* determined that there had to be strict compliance in a power-of-sale foreclosure. And the problem in that specific case was whether there was a right to bring court action. That's what the *Pinti* case develops out of.

This case is a judicial foreclosure. We don't have that same kind of concern. We don't have that same reason to come down to Rhode Island and apply it, especially given that we're dealing with a judicial but, more importantly, because nowhere in the Rhode Island power-of-sale statute, and your Honor has pointed this out in the *Wolf Rock* case and so has Judge

Smith, those two statutes are not the same.

We're not going to apply Massachusetts law, and we can't take that strict compliance decision from *Pinti* and simply superimpose it upon the power-of-sale statute here because the basis for that decision, 183 Section 21 in Massachusetts, you don't have that down here.

Unfortunately or fortunately, however you look at it, nothing within that statute in Rhode Island says you must first comply.

Everything that Mr. Ankrom has cited to in terms of contested foreclosure actions to say give us strict compliance, give us strict compliance, the foundation for each of those cases is a power-of-sale foreclosure. It is not a judicial foreclosure. And for that reason alone, substantial compliance and what we did suffice.

THE COURT: Thanks. We might get direction on *Wolf Rock*. I saw the other day that that's been appealed.

MR. BODURTHA: I can report to the Court it's going to mediation. I'm very hopeful it will settle. I have my doubts, though.

THE COURT: Good luck.

Mr. Ankrom, did you want to respond because you both had sort of cross-motions for summary judgment?

MR. ANKROM: Thank you. My brother said earlier that Massachusetts apparently has a power-of-sale statute but doesn't -- how do I say this? Massachusetts also has judicial foreclosure just like Rhode Island. Just like Rhode Island, lenders can pick and choose what method of foreclosure.

And so when *Pinti* led off by saying we have numerous nonjudicial foreclosures in this state where borrowers are not going to court and having an opportunity to present their defenses, that's the same issues we have in Rhode Island.

And *Pinti* does rely on the Massachusetts statute. I understand that. But *Pinti* also relies on common law. And, in fact, *Bucci*, the Rhode Island Supreme Court, refers to numerous Massachusetts common law cases and First Circuit cases addressing Massachusetts common law.

I don't think the states are that different. And, in fact, my brother makes a big deal that Massachusetts power-of-sale statute says you must comply with the mortgage. Rhode Island Courts have said you must comply with the mortgage.

In both *Bucci* and in *USA Residential Properties v. DiLibero*, it's dicta because judge -- Justice Rubine held that the notice did comply without

much analysis, but he says that before foreclosing, a lender must comply with both the statutory requirements as well as the requirements in the mortgage contract.

So that's exactly what *Pinti* says. I don't see any reason for these two states that are so close together and have such similar bodies of law to deviate dramatically on this one point like my brother is asking.

Your Honor, I would argue *Headco* has very similar policy interests. Both address the notice, that is, the first step in terminating a property right. In these cases, the notice of default, first step in commencing foreclosure to take away someone -- forever take away someone's interest in their home; and *Headco*, first step to terminate a lease and forever take away their right to possess property.

I don't think I have anything further than that. Thank you, your Honor.

THE COURT: Thanks, folks. I'm going to take all the motions under advisement, and you'll hear from me in due course. Thanks, folks.

(Adjourned)

C E R T I F I C A T I O N

I, Karen M. Wischnowsky, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

___December 29, 2016
Date

/s/ Karen M. Wischnowsky
Karen M. Wischnowsky, RPR-RMR-CRR
Federal Official Court Reporter